IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1241

STATE OF FLORIDA,

Petitioner,

against

WILLIAM EDWARD NIDIFFER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

STATE OF FLORIDA,

Petitioner,

against

WILLIAM EDWARD NIDIFFER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, State of Florida, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the case of *William Edward Nidiffer v. State of Florida* (judgment entered January 19, 1977).

CITATIONS TO THE OPINIONS BELOW

The order of the district court is unreported. It is reproduced at pp. 22-28 of the appendix to this petition. The per curiam opinion of the Court of Appeals for the Fifth Circuit affirming the order of the district court is as yet unreported. It is reproduced at pp. 31, 32 of the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 19, 1977. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER THE LOWER COURT ERRED IN AFFIRMING THE ORDER OF THE DISTRICT COURT WHICH DOES NOT COMPLY WITH THE MANDATE OF *Wainwright v. Stone*, 414 U.S. 21 (1973).

42 LW 3267
14 Cr.L 4072

STATEMENT OF THE CASE

On January 7, 1976, respondent filed his petition for writ of habeas corpus in the district court. On February 4, 1976, the district court issued its order directing petitioner to file an answer to the petition and show cause why appropriate relief should not be granted (A 2-5). Petitioner filed its response to the order to show cause on February 23, 1976 (A 6-12). By order dated June 16, 1976, the district court granted the petition for writ of habeas corpus, vacated the plea of nolo contendere as well as the judgment and conviction entered pursuant thereto and the sentence imposed following the judgment and conviction (A 31, 32). Notice of appeal (A 29, 30) was timely filed on July 8, 1976. On January 19, 1977, the lower

court handed down its per curiam decision without opinion affirming the order of the district court.

REASONS FOR GRANTING THE WRIT

THE INSTANT CASE CONFLICTS WITH THE DECISION OF THIS COURT IN WAINWRIGHT V. STONE, 414 U.S. 21 (1973).

The per curiam decision of the Fifth Circuit affirming the order of the district court represents an unmistakable invitation for lower federal courts to ignore this Court's mandate explicitly set forth in *Wainwright v. Stone*. The order of the district court affirmed by the Fifth Circuit is a direct repudiation of *Wainwright v. Stone* and if permitted to stand would simply mean that federal district courts are not compelled to follow the decisions of this Court.

In the district court, respondent

urged that his conviction on a charge of escape was invalid (A 2). Respondent was convicted in state court of the crime of escape as proscribed by then Section 944.40, Florida Statutes, 1969, which provided as follows:

> "944.40 Escapes; penalty.--Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county or municipal, working upon the public roads, or being transported to or from a place of confinement who escapes or attempts to escape from such confinement shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment of not more than 10 years. The punishment of imprisonment imposed under this section shall run consecutive to any former sentence imposed upon any prisoner."

The word "prisoner"as then defined by Section 944.01, Florida Statutes, 1969, was as follows:

> "(5) 'Prisoner' means any person convicted and sentenced by the courts and committed to the state prison, prison farm, or penitentiary, or to the custody of the division, as provided by law."

It was respondent's position in the district court that since he had neither been convicted nor sentenced at the time of his escape, he did not commit any offense cognizable under Section 944.40, Florida Statutes, 1969.

The order of the district court (A 24) is bottomed on the premise that since respondent had not been "convicted and sentenced" at the time of his escape, his subsequent conviction and incarceration therefor was invalid. By its per curiam affirmance without opinion (A 31), the Fifth Circuit evidenced its agreement with the reasoning of the district court. We disagree.

It is petitioner's position that a statute of this state must be taken by federal courts as though it read precisely as the Florida Supreme Court has interpreted it. The decision of this Court in *Wainwright v. Stone* is controlling. There, appellees sought federal habeas corpus on the ground that the Florida statute under which they were convicted was impermissibly vague. The writ was granted, and on appeal the Fifth Circuit affirmed on the ground that Section 800.01, Florida Statutes, was unconstitutionally vague. This Court reversed. We quote from the opinion as follows:

> "For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' Minnesota ex rel. Pearson v Probate Court, 309

US 270, 273, 84 L Ed 744, 60 S Ct 523, 126 ALR 530 (1940). When a state statute has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light. Winters v New York, 333 US 507, 514, 92 L Ed 840, 68 S Ct 665 (1948). This has been the normal view in this Court. Fox v Washington, 236 US 273, 277, 59 L Ed 573, 35 S Ct 383 (1915); Beauharnais v. Illinois, 343 US 250, 253, 96 L Ed 919, 72 S Ct 725 (1952); Mishkin v New York, 383 US 502, 506, 16 L Ed 2d 56, 86 S Ct 958 (1966). The Court of Appeals, therefore, was not free to ignore Delaney and related cases; and as construed by those cases, § 800.01 afforded appellees ample notice that their conduct was forbidden by law." *Id.* at 38 L. Ed.2d 182.

In the case of *Abigando v. State*, 239 So.2d 646 (Fla.App. 1 1970), the Florida First District Court of Appeal had occasion to construe Section 944.40,

Florida Statutes, 1969, then in effect. The court reversed on the ground that the evidence failed to show that the defendant was in lawful custody at the time of the attempted escape. In the course of its opinion, the court commented on the essential elements of the crime of escape as then proscribed by Section 944.40. We quote:

> "'Before one may be charged with the offense of escape, it must be shown that at the time of the alleged escape the prisoner was held in lawful custody on a valid charge of a criminal offense or upon a conviction of a criminal offense. ***'"

See also *Naylor v. State*, 250 So.2d 660 (Fla.App. 2 1971); and *State ex rel. Wilson v. Culver*, 110 So.2d 674 (Fla. 1959).

Respondent neither in the district court nor in the Court of Appeals denied the fact that he was being held in law-

ful custody at the time of his escape. To the contrary, see Item 10(a) of the petition which is reproduced in the appendix at p. 1.

In *State ex rel. Wilson v. Culver, supra*, the same argument was urged before the Florida Supreme Court as respondent urged in the lower courts. In rejecting this argument, it was necessary for that court to construe the same statute that provided the basis for respondent's conviction in the state court. We quote from the opinion in *Culver, supra:*

> The petitioner also contends that a person cannot lawfully be charged and convicted of an escape while confined on a felony charge, until he is tried and convicted of such felony. This contention is also without merit. Our statute, § 944.40, Fla.Stat. 1957, F.S.A., provides that

> "'Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county or municipal, * * * who escapes or attempts to escape from such confinement, if *the charge* or conviction under which said prisoner is incarcerated constitutes a felony under the laws of the jurisdiction which has caused his incarceration he shall be guilty of a misdemeanor * * *.' (Emphasis supplied.)
>
> "It can thus be seen that escape from lawful confinement is, under the statute, a substantive offense, in and of itself, without regard to whether the prisoner was confined pursuant to *a charge* or pursuant to *a conviction* of a crime." (Emphasis the court's.) *Id.* at 675.

Just as this Court remarked in *Wainwright v. Stone* that the Court of Appeals was not free to ignore *Delaney* and related cases, just so it is petitioner's position that the Fifth Circuit was not free to ignore *Culver* and related cases construing Section 944.40, Florida Statutes, 1969. This is so because as construed

by those cases the statute in question afforded respondent ample notice that his conduct was forbidden by law, i. e., that escape from confinement pursuant to a charge of crime was a substantive offense under the statute. We reiterate: This is the way the statute has been authoritatively construed by the Florida Supreme Court and under the mandate of *Stone*, the Fifth Circuit was required to take the statute as though it read precisely as the Florida Supreme Court had interpreted it.

The case of *Brochu v. State*, 258 So.2d 286 (Fla.App. 1 1972), cited by the lower court as authority for its order is not in point. The decision in *Brochu* turned on the insufficiency of the evidence to support the judgment of conviction for the crime of escape. While the court

pointed out that the state failed to prove that Brochu was a prisoner in custody serving a sentence, it must be admitted that neither did the prosecution show that he was being held in lawful custody pursuant to a charge of crime. It is emphasized that the decision in *Brochu* in no way negates, and indeed it could not, the decision of the Florida Supreme Court in *Culver* that escape from confinement pursuant to a charge of crime is a substantive offense under the statute.

This question is of great importance to state courts because it presents the issue of whether this Court will compel compliance with its decisions by the lower federal courts. When district and circuit courts disregard controlling precedent by this Court, then state law enforcement authorities have no avenue

of relief other than from this Court. The decision of the Fifth Circuit affirming the order of the district court is diametrically opposed to the clear teaching of *Wainwright v. Stone* and should not be allowed to stand.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General of the
State of Florida
Attorney for Petitioner

WALLACE E. ALLBRITTON
Assistant Attorney General
of Counsel

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10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Petitioner at the time of his alleged escape was being held in custody in the Escambia Co. Jail awaiting trial on felony charges.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILLIAM EDWARD NIDIFFER,

Petitioner,

vs

STATE OF FLORIDA,

Respondent.

ORDER

This cause is before the Court on Petition for Writ of Habeas Corpus pursuant to 28 USC 2254. It appears Petitioner's motion to proceed in forma pauperis should be granted.

Petitioner complains that he is confined pursuant to an invalid conviction on a charge of escape. From the Petition before the Court, it appears that an information was filed against Petitioner in the Court of Record of Escam-

bia County, Florida, on April 22, 1971. Prior to that date, other informations had been filed against Petitioner on various drug charges. It appears Petitioner pled guilty to all charges and was sentenced on May 10, 1971. Petitioner received concurrent sentences on the drug charges and a five-year consecutive sentence on the charge of escape. Petitioner now contends that at the time of the alleged escape he was not a prisoner as defined by Section 944.04 Florida Statutes 1969. In support of his contention, Petitioner claims the Courts of Florida have uniformly held that a person could not be convicted under Section 944.40 Florida Statutes 1969, when it was not proven that he had been convicted and sentenced, as required by Section 944.04. It is Petitioner's

claim that at the time of the alleged escape he was not in custody after conviction and sentencing for any offense. The allegations of Petitioner are not such as may be summarily dismissed for failure to state grounds upon which relief can be granted.

It is, therefore,

ORDERED:

1. Petitioner's motion to proceed in forma pauperis is granted.

2. Respondent shall have thirty (30) days from date hereof to answer the petition herein filed and show cause why appropriate relief should not be granted to Petitioner and without limiting said answer Respondent shall advise whether Petitioner has exhausted his state court remedies as to the issues raised in this petition.

3. That upon the filing of Respondent's answer within the stated time, this Court will enter such further Order as may be deemed appropriate.

4. The Clerk of this Court is directed to mail a copy of this Order and a copy of the Federal Petition of Habeas Corpus to the Attorney General of Florida. The Clerk shall likewise forward to Petitioner a copy of this Order.

DONE AND ORDERED in Chambers in Pensacola, Florida, this 4 day of February, 1976.

WINSTON E. ARNOW
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILLIAM EDWARD NIDIFFER,

Petitioner,

-v- CASE NO. PCA 76-18

STATE OF FLORIDA,

Respondent.

RESPONSE

COMES now respondent, by and through its undersigned attorneys, and makes this response to the order to show cause heretofore entered in the captioned proceeding on the 4th day of February 1976 and says:

I.

Respondent holds petitioner in custody pursuant to a commitment issued by the Court of Record, in and for Escambia

County, Florida, on May 10, 1971; judgment and sentence entered May 10, 1971; and information filed April 22, 1971, copies of which are attached hereto as Exhibits 1, 2, and 3 respectively.

II.

Respondent agrees that petitioner did enter a plea of nolo contendere to the charge of escape on May 10, 1971. No direct appeal was taken. However, on or about February 26, 1973, petitioner filed a motion to vacate conviction and sentence under Rule 3.850, Florida Rules of Criminal Procedure, which was denied by order entered March 2, 1973. Petitioner did take an appeal from the order denying his motion to vacate by filing a timely notice of appeal. A copy of the entire record on appeal filed in the First District Court of Appeal setting forth a

copy of the information, a copy of stenographic transcript of proceedings on May 10, 1971, motion to vacate conviction and sentence, order denying motion to vacate conviction and sentence, notice of appeal, etc. are attached as Exhibit 4. The order of the trial judge denying petitioner's motion to vacate judgment and sentence was affirmed by the Florida First District Court of Appeal, a copy of the slip opinion of that court is attached as Exhibit 5.

III.

Petitioner's contention that he is held in custody pursuant to an invalid conviction on a charge of escape is without merit. In the case of Abigando v. State, 239 So.2d 646 (Fla.App. 1 1970), the First District Court of Appeal had occasion to construe Section 944.40,

Florida Statutes, then in effect. In reversing on the ground that the evidence failed to show that appellant was in lawful custody at the time of the attempted escape, the court had occasion to comment on the essential elements of the crime of escape as then proscribed by Section 944.40. We quote:

> "'Before one may be charged with the offense of escape, it must be shown that at the time of the alleged escape the prisoner was held in lawful custody on a valid charge of a criminal offense or upon a conviction of a criminal offense. * * *'"

See also Naylor v. State, 250 So.2d 660 (Fla.App. 2 1971); and State ex rel. Wilson v. Culver, 110 So.2d 674 (Fla. 1959). Respondent does not read petitioner's petition as denying the fact that he was being held in lawful custody at the time of his escape. In Culver,

supra, in construing the Florida escape statute, the Supreme Court of Florida had this to say:

> "It can thus be seen that escape from lawful confinement is, under the statute, a substantive offense, in and of itself, without regard to whether the prisoner was confined pursuant to a charge or pursuant to a conviction of a crime." (Emphasis the courts.) Id. at 675.

Contrary to what petitioner would have this court believe, a statute of this state must be taken by federal courts as though it read precisely as the Florida Supreme Court has interpreted it. Wainwright v. Stone, 414 U.S. 21, 38 L.Ed.2d 179, 94 S.Ct. 190 (1973). Note the following:

> "When a state statute has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light."

The case of Brochu v. State, 258 So.2d 286 (Fla.App. 1 1972), relied on by petitioner is not in point. The decision in Brochu turned on the insufficiency of the evidence to support the judgment of conviction of escape. While the court pointed out that the state failed to prove that the defendant was a prisoner in custody serving a sentence, it must be admitted that neither was the defendant being held in lawful custody pursuant to a charge of crime. It is emphasized that the decision in Brochu in no way negates, and indeed it could not, the decision of the Florida Supreme Court in Culver supra, that escape from confinement pursuant to a charge of crime is a substantive offense under the statute.

IV.

Each and every allegation challenging the legality of petitioner's incarceration not heretofore specifically answered or denied is hereby severally denied and the contrary allegation lodged.

CONCLUSION

The petition for writ of habeas corpus should be denied.

ROBERT L. SHEVIN
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT
The Capitol
Tallahassee, Fla. 32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Response to Mr. William Edward Nidiffer, #030513, Florida State Prison, P. O. Box 747, Starke, Florida 32091, by mail, this 20th day of February 1976.

Wallace E. Allbritton

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
OF DIVISION OF CORRECTIONS

COURT OF RECORD
(Court)

ESCAMBIA County. Winter Term, 19 71

Conviction for Felonious Escape
(Offense)

Date of conviction May 10, 1971

Date sentence imposed May 10, 1971

Term of sentence Five (5) years State Prison to run consecutively with outstanding sentences and Florida Police Academy cost of $1 or 1 day additional

State of Florida,

Plaintiff,

-v- "Case No. 71-1149

WILLIAM EDWARD NIDIFFER,

Defendant.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

Information
(Indictment) (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable M.C. Blanchard

Judge of said Court, as also

Ernie Lee Magaha

Clerk, and the Seal thereof, this the

10th day of May, 19 71

Clerk of said Court

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

THE STATE OF FLORIDA,

Plaintiff,

-v-

WILLIAM EDWARD NIDIFFER,

Defendant.

This matter came on to be heard before the Honorable M. C. Blanchard, Judge of Division "E" of the above entitled Court, on the 10th day of May, A.D. 1971, and the following proceedings were had:

Hon. Carl H. Harper was present representing the State of Florida.

Hon. James McAtee was present representing the Defendant.

Hon. Artice L. McGraw was present representing the Defendant.

MR. HARPER: William Edward Nidiffer,

you are charged on April 17th, 1971, in Escambia County, Florida, in case No. 71-1149, that at about 10:30 PM, that you were then and there a prisoner lawfully confined in the County Jail of Escambia County, Florida, that you did unlawfully and feloniously escape from such confinement. How do you plead to that?

MR. McATEE: We enter a plea of nolo.

THE COURT: You are William Nidiffer?

MR. NIDIFFER: Yes, sir.

THE COURT: How old are you?

MR. NIDIFFER: Twenty five.

THE COURT: You understand you are charged in this case with escaping from the County Jail on or about April 17th, 1971, while therein lawfully confined. You understand that is what you are charged with?

MR. NIDIFFER: Yes, sir, I guess so.

THE COURT: You understand the penalty for that is up to ten years in the State Prison or one year in the County Jail?

MR. NIDIFFER: Yes, sir.

THE COURT: Did you in fact escape from the jail as charged?

MR. NIDIFFER: Yes, sir.

THE COURT: How long were you free before they re-captured you?

MR. NIDIFFER: About an hour.

THE COURT: About an hour?

MR. NIDIFFER: Yes, sir.

THE COURT: Has any one promised you probation or any other kind of leniency to get you to plead nolo contendere to this charge of escape?

MR. NIDIFFER: No, sir.

THE COURT: Has any one forced you or threatened you in anyway to get you to

plead?

MR. NIDIFFER: No, sir.

THE COURT: The Court will accept the plea.

MR. HARPER: Your Honor, we have some other cases here I would like to arraign him on, five other cases. In case No. 71-972 I would like to amend the spelling of his last name from Nediffer to Nidiffer.

THE COURT: I will let you amend it.

MR. HARPER: William E. Nidiffer, you are charged on March 11th, 1971, under the first count, in Escambia County, Florida, at Leonard's Recreation Center, 4222 West Fairfield Drive, that you did unlawfully have actual or constructive possession or control of an hallucinogenic drug, to-wit, LSD. How do you plead to that?

MR. McGRAW: Nolo contendere.

MR. HARPER: Under the second count of the information you are charged on March 11th, 1971, in Escambia County, Florida, at Leonard's Recreation Center, that you did unlawfully and feloniously deliver or cause to be delivered to Richard Hernan, a Special Agent of the Florida Department of Law Enforcement, an hallucinogenic drug, to-wit, LSD. How do you plead to that?

MR. McGRAW: Nolo contendere.

THE COURT: In that particular case did you have in your possession and deliver to another some LSD?

MR. NIDIFFER: Yes, sir.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A.D. 1973

WILLIAM EDWARD NIDIFFER, *

Appellant, *

vs. * CASE NO. T-40

STATE OF FLORIDA, *

Appellee. *

Opinion filed October 9, 1973

An Appeal from the Circuit Court for Escambia County.
M.C. Blanchard, Judge.

William Edward Nidiffer, in Proper Person, for Appellant.

Robert L. Shevin, Attorney General; Enoch J. Whitney, Assistant Attorney General, for Appellee.

PER CURIAM

AFFIRMED.

Rawls, Chief Judge, SPECTOR and Johnson, J.J., CONCUR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILLIAM EDWARD NIDIFFER,)

Petitioner,)

vs.) PCA 76-18

STATE OF FLORIDA,)

Respondent.)

ORDER

This cause is before the Court upon the petition of William Edward Nidiffer for writ of habeas corpus. This Court has previously entered its order granting leave to proceed in forma pauperis and requiring that responsive pleadings be filed. The facts of the case are uncontested. On May 10, 1971, the petitioner appeared in the Circuit Court in and for Escambia County, Florida, and tendered pleas of nolo contendere to

seven separate charges in six different cases. One case, No. 71-1149 charged that the petitioner escaped from the Escambia County Jail on April 17, 1971, in violation of Florida Statute 944.40. After sentencing the defendant on the six drug-related charges, the state court sentenced the defendant on the escape charge to confinement in the state prison for a period of five years, which sentence was to run consecutive to the sentences imposed for the drug offenses.

The petitioner correctly notes that whereas Florida Statute 944.40 then prohibited, as it does now, "any prisoner" from escaping, the term "prisoner" was at the time defined as "any person convicted and sentenced (emphasis supplied) by the courts and committed to the state prison, prison farm or penitentiary, or

to the custody of the Division, as provided by law." Florida Statute 944.02(5) (1969).

The petitioner argues that since he had neither been convicted nor sentenced at the time of his "escape" he had not committed an offense under Florida Statute 944.40. This technicality indeed presented a significant loop-hole in the Florida law in 1971. Apparently, the Florida Legislature, soon after the date of sentencing in this case, recognized the deficiency and sought to correct it. On June 27, 1971, the Governor approved, and on June 28, 1971, there was filed in the office of the Secretary of State, an act amending Florida Statute 944.02(5) to read as follows:

> "(5) "Prisoner" means any person who is under arrest and in the lawful custody of any law enforcement official, or any person convicted

> and sentenced by any court and committed to any municipal or county jail or state prison, prison farm or penitentiary, or to the custody of the Division, as provided by law." Vol. I, Laws of Florida, General Acts, Ch. 71-345 (1971).

This act took effect on September 1, 1971, and has been carried over intact to the present.

Nonetheless, in this case at least, the problem of an apparently unlawful conviction remains. In the case of Brochu v. State, 258 So.2d 286 (1st D.C. A. Fla. 1972) Judge Rawls, writing for an unanimous court noted:

> "The cited statutes establish without contradiction that an essential element of the crime of escape was proof that the person charged had been convicted and sentenced to a state prison, prison farm or penitentiary, or to the custody of the Division, as provided by law.

> In the instant case such proof was wholly lacking on the part of the state and thus the conviction must be set aside. It is uncontroverted that Brochu escaped from the Volusia County Convict Camp, but it is likewise uncontroverted that the state never established that he was a prisoner "convicted and sentenced" in accordance with the law of this sovereign at the time he departed from the confines of the camp."

A similar case is Burgess v. State, 283 So.2d 399 (4th D.C.A. Fla. 1973) in which that court noted that the "defendant did not fall within the statutory definition of prisoner at the time (even though he had been convicted) because he had not yet been sentenced." See also, Van Den Bliek v. State, 281 So.2d 218 (4th D.C.A. Fla. 1973); State v. Benjamin, 267 So.2d 348 (4th D.C.A. Fla. 1972).

It is noted that while the petitioner did not take a direct appeal of this

judgment and conviction in the state courts, he did file a Motion to Vacate the conviction and sentence pursuant to Rule 3.850, Florida Rules of Criminal Procedure. This motion was denied by the trial court on March 2, 1973, and on October 9, 1973, the First District Court of Appeal for the State of Florida per curiam affirmed the lower court's denial of the Motion. (Exhibit 5) Accordingly, it appears the petitioner has exhausted his available state remedies. Picard v. Conner, 404 U.S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971); Brown v. Estelle, No. 76-1217 (5th Cir. May 3, 1976); Fulford v. Klein, No. 74-2723 (5th Cir. March 25, 1976). Accordingly, therefore, it is

ORDERED:

The petition for writ of habeas cor-

pus is hereby granted and the plea of nolo contendere entered by the petitioner in subject Case Number 71-1149 as well as the judgment and conviction entered pursuant thereto and the sentence imposed following such judgment and conviction in said case, are hereby vacated and set aside.

DONE AND ORDERED in Chambers at Pensacola, Florida, this 16 day of June 1976.

WINSTON E. ARNOW, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILLIAM EDWARD NIDIFFER,

Petitioner,

-v- PCA 76-18

STATE OF FLORIDA,

Respondent.

NOTICE OF APPEAL

Notice is hereby given that the State of Florida, respondent above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from an order granting the petition for writ of habeas corpus and vacating and setting aside petitioner's plea of nolo contendere and the judgment and conviction entered thereon, said order having been entered in this action on the 16th day of June 1976.

ROBERT L. SHEVIN
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT
The Capitol
Tallahassee, Fla. 32304

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2826
Summary Calendar*

WILLIAM EDWARD NIDIFFER,

Petitioner-Appellee,

versus

STATE OF FLORIDA,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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(January 19, 1977)

BEFORE BROWN, Chief Judge, and Gewin and Morgan, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1/]

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

1/See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.